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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CV 08

4703

JL

BRAVE NEW FILMS 501(C)(4),

Plaintiff,

v.

MICHAEL WEINER aka MICHAEL SAVAGE,
and ORIGINAL TALK RADIO NETWORK,
INC.,

Defendants.

Case No.

COMPLAINT FOR DECLARATORY
JUDGMENT AND DAMAGES

DEMAND FOR JURY TRIAL

COMPLAINT FOR DECLARATORY JUDGMENT AND DAMAGES

1 belief, OTRN is also known and does business as “Talk Radio Network,” with its principal place
 2 of business in Oregon. According to Talk Radio Network’s website, Talk Radio Network
 3 syndicates and distributes talk radio content, including “The Michael Savage Show,” also known
 4 as “The Savage Nation,” to over 300 affiliate radio stations in the nation’s top radio markets,
 5 including San Francisco. OTRN does business in the Northern District of California.

6 4. Defendant Michael Weiner (“Savage”) is a nationally syndicated talk show host
 7 who performs under the name Michael Savage and hosts the talk show program “The Michael
 8 Savage Show.” “The Michael Savage Show” is based in San Francisco, California and Savage
 9 resides in Marin County, California. According to the records of the United States Copyright
 10 Office, and according to Savage himself, Savage is the registered copyright owner of the October
 11 29, 2007 radio broadcast of “The Michael Savage Show.” (A copy of Savage’s copyright
 12 registration for the October 29, 2007 broadcast is attached to this Complaint as Exhibit A.)

13 5. On information and belief, OTRN has acted as Savage’s agent, and OTRN’s
 14 actions as alleged herein were done with Savage’s knowledge and permission.

15 **JURISDICTION AND VENUE**

16 6. This action arises under the copyright laws of the United States, 17 U.S.C. §§ 101
 17 et seq. This Court has subject matter jurisdiction over this claim pursuant to 28 U.S.C. §§ 1331
 18 and 1338, and the Declaratory Judgment Act, 28 U.S.C. § 2291.

19 7. This Court has personal jurisdiction over OTRN because it has purposefully
 20 availed itself of the laws of the State of California by distributing radio programming in
 21 California. In addition, OTRN’s takedown notice was sent to San Bruno, California, and was
 22 calculated to cause harm in California because access to the Video was disabled on YouTube’s
 23 servers in San Bruno, California, and Brave New Films is located in Los Angeles, California.

24 8. This Court has personal jurisdiction over Savage because he resides within the
 25 Northern District of California, does business within the Northern District of California, and
 26 broadcasts his show in and from the Northern District of California.

27 9. Venue is proper in the Northern District of California because a substantial
 28 portion of the events underlying this case took place in this District, including the broadcast of

1 the program "The Michael Savage Show," and the removal of the Video criticizing Savage from
2 YouTube, which is based in San Bruno, California. Venue is also proper because Savage resides
3 in the Northern District of California.

4 **INTRADISTRICT ASSIGNMENT**

5 10. This matter is properly assigned to the San Francisco division because a
6 substantial part of the events that gave rise to the claims herein occurred in San Bruno,
7 California, and Savage resides in Marin County.

8 **FACTUAL ALLEGATIONS**

9 11. Brave New Films produces and distributes films, blogs, television shows and
10 short videos that challenge corporate and political misbehavior. Its co-founder, Robert
11 Greenwald, is well known for his documentaries that take on commercial and political interests.
12 Among other things, he directed and produced "Outfoxed: Rupert Murdoch's War on
13 Journalism" and "Wal-Mart: The High Cost of Low Price." To date, Greenwald's films have
14 received 25 Emmy nominations, four cable ACE Award nominations, two Golden Globe
15 nominations, the Peabody Award, the Robert Wood Johnson Award, and eight Awards of
16 Excellence from the Film Advisory Board. He was awarded the 2002 Producer of the Year
17 Award by the American Film Institute.

18 12. Brave New Films has produced hundreds of short videos that are distributed
19 across a variety of channels. The largest channel through which Brave New Films distributes its
20 content is YouTube, on which Brave New Films maintains the "bravenewfilms" channel. This
21 channel contains approximately 300 videos that, together, as believed to have been viewed
22 approximately 32 million times.

23 13. Savage's radio program "The Michael Savage Show" is a nationally syndicated
24 show that, according to Savage, reaches millions of listeners each week.

25 14. During the two-hour October 29, 2007 broadcast of "The Michael Savage Show,"
26 Savage went on an anti-Muslim tirade, attacking Islam and the Quran and denigrating Muslims
27 as "throwbacks" who should be deported "without due process."
28

1 15. Shortly after this show aired, the Council for American-Islamic Relations
2 (“CAIR”), the nation’s largest Muslim civil rights posted a detailed criticism of Savage on its
3 website (www.cair.com) entitled “National Radio Host Goes On Anti-Muslim Tirade,” which
4 included more than four minutes of audio excerpts from Savage’s October 29, 2007 broadcast.
5 CAIR’s website explained its vigorous objections to Savage’s commentary, and placed its
6 criticisms in a larger cultural and historical context. CAIR requested that companies that
7 advertise on “The Savage Nation” pull their ads from Savage’s show because of his bigoted
8 statements.

9 16. In response to CAIR’s criticism of him, Savage filed a lawsuit against CAIR on
10 December 3, 2007 in this Court, Case No. C 07-06076-SI (N.D. Cal.), alleging that CAIR
11 infringed his copyright by posting audio excerpts of his October 29 radio show on the CAIR
12 website. Savage’s complaint also included a RICO claim. Savage did not allege that CAIR had
13 made any false or tortious statements about him.

14 17. On January 18, 2008, Brave New Films created and uploaded to its YouTube
15 channel the Video, which was posted to YouTube at the URL
16 <http://www.youtube.com/watch?v=CtY-JWahHQs>. (A copy of the Video is attached to this
17 Complaint as Exhibit B.)

18 18. The Video criticizes Savage for the same anti-Muslim comments made on his
19 October 29, 2007 radio show and for acting as a bully who attempts to silence his critics through
20 litigation. The Video uses audio excerpts from Savage’s October 29, 2007 broadcast, as CAIR
21 did on its website. The Video runs one minute and twenty-three seconds, and audio excerpts
22 from “The Michael Savage Show” play during approximately one minute in the Video. In that
23 minute, Savage tells Muslims to “take [their] religion and shove it up [their] behind,” urges his
24 listeners to confront Muslims in the “supermarket line,” and urges the federal government to
25 deport Muslims. In addition to playing this brief audio clip, the Video directs viewers to
26 www.nosavage.org, a website dedicated to exposing and criticizing Savage’s views that lists
27 certain companies that have advertised on “The Michael Savage Show,” and urges viewers to
28 “do something” about Savage’s intolerance.

1 19. On January 18, 2008, Brave New Films launched a website, www.nosavage.org,
2 dedicated to informing the public about Savage's hateful views by showing the Video and
3 providing information about how to contact advertisers and ask them to remove ads from "The
4 Michael Savage Show." The website includes information about Savage's retaliatory lawsuit
5 against CAIR and criticizes his attempts to censor CAIR by suing the group for copyright
6 infringement.

7 20. On July 25, 2008, this Court dismissed without leave to amend Savage's
8 copyright claim against CAIR. The Court granted CAIR's motion for judgment on the pleadings
9 because it found that CAIR's use of the four-minute audio clip taken from Savage's October 29
10 broadcast was fair use. Recognizing that CAIR used limited excerpts from the radio show to
11 criticize publicly the anti-Muslim message of those excerpts, the Court held "that the majority of
12 the four fair use factors, including the most important factors, weigh in favor of [CAIR]." See
13 *Savage v. Council on American-Islamic Relations et al.*, Case No. C 07-06076-SI at 13 (N.D.
14 Cal. July 25, 2008) (Document No. 38).

15 21. Savage lost his copyright infringement claim against CAIR, and on August 15,
16 2008 this Court entered a final judgment dismissing the case in its entirety.

17 22. The Video uses the same statements that CAIR used, from the same episode of
18 Mr. Savage's show, for less time than CAIR did, in a video likewise designed to criticize Savage
19 and his statements about Muslims. Like the CAIR video, Brave New Films' use of a short clip
20 from "The Michael Savage Show" in the course of directly criticizing the show's host for the
21 very words he is saying in the clip is clearly fair use. The clip uses less than a minute from
22 Savage's two-hour October 29, 2007 broadcast. The use of the clip was transformative, in that
23 its purpose is to criticize Savage and his views, was non-commercial, was not a realistic
24 substitute for the original radio show, and inflicted no cognizable harm on the market for
25 Savage's copyrighted work.

26 23. On September 29, 2008, counsel for OTRN delivered a letter by facsimile to
27 YouTube's "DMCA Complaints" department, demanding the removal of "Michael Savage Hates
28 Muslims," the Video at issue in this case, and 258 other videos that OTRN asserted were

1 infringing its “exclusive rights” of “publication[], broadcast[], and/or reproduction[].” A copy of
 2 the September 29 letter is attached to this Complaint as Exhibit C. (The September 29 letter
 3 included an exhibit listing the videos OTRN was complaining about, but the facsimile copy of
 4 that exhibit was incomplete. OTRN later sent a complete copy of the exhibit to its September 29
 5 letter, which is attached to this Complaint as Exhibit D.)

6 24. YouTube treated this letter as a takedown notice pursuant to section 512(c)(3) of
 7 the Digital Millennium Copyright Act (“DMCA”). 17 U.S.C. § 512(c)(3). On October 2, 2008,
 8 YouTube disabled access to the Video and notified Brave New Films that this video had been
 9 removed pursuant to the complaint by OTRN. (A copy of YouTube’s notification to Brave New
 10 Films is attached to this Complaint as Exhibit E.)

11 25. Following the removal, Brave New Films submitted a DMCA counter-notice to
 12 YouTube. Although YouTube has stated that the Video will be restored in the future, it has not
 13 been restored yet.

14 26. In addition to disabling access to the Video, YouTube disabled access to Brave
 15 New Films’ entire YouTube channel, which is Brave New Films’ main channel of distribution
 16 for its videos. Although YouTube restored access to the channel following notice from Brave
 17 New Films’ counsel, temporary disablement of Brave New Films’ channel nevertheless caused
 18 damages to Brave New Films, including but not limited to harm to its free speech rights and the
 19 visibility Brave New Films had worked so hard to achieve.

20 **FIRST CLAIM: DECLARATORY JUDGMENT**

21 27. Brave New Films repeats and incorporates herein by reference the allegations in
 22 the preceding paragraphs of this Complaint.

23 28. There is a real and actual controversy between Brave New Films, and Savage and
 24 OTRN, about whether the Video infringes Defendants’ copyrights or any other “exclusive
 25 rights” they purport to assert against YouTube. Specifically, OTRN asserted in its September 29
 26 letter to YouTube that the Video infringes its “exclusive rights” of “publication[], broadcast[],
 27 and/or reproduction[]” and demanded that the Video be removed from YouTube pursuant to
 28 these complaints. Rights of reproduction and distribution are exclusive rights protected by the

1 Copyright Act, 17 U.S.C. § 106, and Savage is the registered owner of the copyrights in the
 2 October 29, 2007 broadcast of “The Michael Savage Show,” the source of the audio content
 3 from Savage’s show used in the Video.

4 29. The Video does not infringe any exclusive rights secured by the Copyright Act or
 5 any other state or federal law. It is protected by the First Amendment to the United States
 6 Constitution and judicial decisions construing such laws, and the Fair Use Doctrine, codified at
 7 17 U.S.C. § 107.

8 30. Brave New Films is therefore entitled to a declaration and judgment that the
 9 Video does not infringe the copyrights of OTRN or Savage, or any other exclusive rights that
 10 OTRN or Savage might assert under state or federal law.

11 **SECOND CLAIM: 17 U.S.C. § 512(f) MISREPRESENTATION**

12 31. Brave New Films repeats and incorporates herein by reference the allegations in
 13 the preceding paragraphs of this Complaint.

14 32. OTRN’s September 29, 2008 letter purported to be a notification sent pursuant to
 15 the DMCA, and was treated by YouTube as a DMCA takedown notice. In its September 29
 16 letter, OTRN asserted that “Michael Savage Hates Muslims” infringes its “exclusive rights,”
 17 including the rights of “publication[], broadcast[], and/or reproduction[]” when in fact the Video
 18 infringes no such rights. Accordingly, the letter and its allegations of infringement were false.

19 33. On information and belief, OTRN and Savage had actual or constructive
 20 knowledge that the Video did not infringe any “exclusive rights” of “publication[], broadcast[],
 21 and/or reproduction[].” These are rights protected by the Copyright Act, 17 U.S.C. § 106. At
 22 the time OTRN issued its takedown notice, the United States Copyright Office shows that
 23 Savage was the legal owner of the copyrighted material. *See* Exhibit A (Savage’s copyright
 24 registration for the October 29, 2007 show). The same material used in nearly the identical
 25 manner by CAIR was held by this Court to be fair use and non-infringing as a matter of law.
 26 The decision of this Court notwithstanding, the use of short fragments of a two-hour radio
 27 broadcast to demonstrate and criticize the views of its host is a self-evident fair use, and
 28 obviously protected by the First Amendment’s free speech guarantees. Accordingly, the letter’s

1 assertion that the Video infringes any “exclusive right” was a knowing and material
2 misrepresentation in violation of 17 U.S.C. § 512(f).

3 34. As a direct and proximate result of the actions alleged in this Complaint, Brave
4 New Films has suffered damages, including but not limited to harm to its free speech rights, and
5 the expenses associated with responding to the improper take-down notice and vindicating its
6 free speech rights.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Brave New Films prays for judgment as follows:

9 1. A declaratory judgment that the Video does not infringe any copyrights, or any
10 other exclusive right, owned or asserted by OTRN and/or Savage;

11 2. Injunctive relief restraining OTRN and Savage, and each of them, and each of
12 their agents, servants, employees, successors and assigns, and all others in concert and privity
13 with them, from bringing any lawsuit or threatening legal action relating to the Video, delivering
14 DMCA takedown notices directed at the Video to any third party, or asserting to any third party
15 that it has any legal right to interfere with the publication, distribution, performance, display, or
16 licensing of the Video, or to interfere with any linking to or from the Video on the internet;

17 3. Damages according to proof;

18 4. Attorneys’ fees;

19 5. Brave New Films’ costs and disbursements; and

20 6. Such other and further relief as the Court shall find just and proper.

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DEMAND FOR JURY TRIAL

Plaintiff Brave New Films requests a trial by jury on all issues so triable, including but not limited to those issues and claims set forth in any amended complaint or consolidated action.

DATED: October 10, 2008

STANFORD LAW SCHOOL CENTER FOR
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DATED: October 10, 2008

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